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In The

Supreme Court of the United States

October Term, 1993

HOWARD W. FISCH, JR., INDIVIDUALLY AND ON BEHALF OF ALL CO-DEFENDANTS AND CO-TENANTS,

Petitioners,

vs.

RANDALL MILL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its brief in opposition to Fisch's Petition for Writ of Certiorari, Randall Mill claims that Fisch has failed to demonstrate that the Georgia Mineral Rights lapse Statute is unconstitutionally vague, and assuming that the Statute was vague, the vagueness has been cured by the decision of the Georgia Supreme Court in this case. For the reasons set forth below, the Respondent's arguments fail and Fisch's Petition for Writ of Certiorari should be granted.

I. The Statute is unconstitutionally vague and indefinite.

Contrary to the Respondent's assertion, the Georgia Supreme Court's decision in this case conflicts with a decision of this Court regarding a federal question. In *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), this Court held that a state has the power to condition permanent retention of property rights on performance of reasonable conditions indicating a present intention to retain the interest which constitute a minimal burden on the owner of the interest. *Id.* at 790.

The Georgia Statute, however, alone and as interpreted by the opinion below in this case, does not impose reasonable conditions that constitute minimal burdens in order for an owner of mineral rights to retain his or her interest. The Statute provides that the mineral rights lapse if the claimant "neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing

of the petition has provided in sub-section (b) of the Code Section." O.C.G.A. § 44-5-168(a).

In an attempt to protect the Petitioners' rights, Fisch performed affirmative acts in order to preserve their interests. During the seven years prior to the institution of Randall Mill's action, Fisch regularly visited the property, searched for vein quartz samples to detect gold, took samples away in his car, did research on the ownership of the mineral rights and the possibility for commercial extraction, obtained assay reports of gold and other minerals, and studied geological maps. *See,* Petition for Writ of Certiorari at page 7. The Georgia Supreme Court's holding that these acts are insufficient to constitute working or attempting to work the mineral rights evidences the inherent vagueness of the Statute.

Moreover, also within the seven years prior to the filing of Randall Mill's action, Fisch attempted on at least two occasions to report the subject property, among others, for ad valorem tax purposes in Fulton County, Georgia. He was told by employees that there was no provision for filing or paying taxes on subsurface mineral rights separate and apart from the surface rights.[1] The fact that the Statute provides for payment of taxes in order to protect one's mineral interest where no mechanism exists to pay taxes on subsurface mineral rights further illustrates the constitutional defects of the Statute.

The Statute's vagueness is apparent especially in light of the legislative intent behind the Statute. As acknowledged by the Georgia Supreme Court, the Statute

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[1] *See,* Pet. App. 27a-28a, 44a-45a.

is meant, inter alia, to encourage collection of taxes.[2] Although there is an explicit provision in the Statute for the payment of taxes, and the legislative intent behind the Statute is to encourage the collection of taxes, the fact that no mechanism exists for the payment of taxes on mineral rights in Fulton County, Georgia renders it impossible for the owner of mineral rights to comply with the plain language of the statute.

Moreover, the Georgia Supreme Court's holding that Fisch should have filed a writ of mandamus to compel collection of taxes is not a reasonable condition or minimal burden as set forth in *Texaco v. Short*. Relying on *High Ol' Times v. Busbee*, 673 F.2d 125 (11th Cir. 1982), the Respondent contends that even if the Statute is unconstitutionally vague, the Georgia Supreme Court has cured that vagueness by requiring an owner of mineral interests to either conduct actual mining activity or to file a writ of mandamus to compel the tax commissioner to assess tax on the subsurface rights and to accept a return for taxes on them. See Respondent's Brief in Opposition to Writ of Certiorari at pp. 6-7.

The Georgia Supreme Court failed to correct the constitutional infirmities of the Statute because the conditions imposed on owners of mineral rights under *Fisch v. Randall Mill Corp.*, 262 Ga. 861, 426 S.E.2d 883 (1993) exceed the reasonable conditions which constitute minimal burdens test under *Texaco v. Short*. Therefore, the Statute has not been cured by the decision of the Georgia

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[2] *See*, Pet. App. 2a.

Supreme Court in this case, and Fisch has been unconstitutionally deprived of his property. Accordingly, Fisch's Petition for Writ of Certiorari should be granted.

II. The case presents questions of federal law which conflict with a decision of this Court.

The Respondent mischaracterizes Fisch's reliance upon *Texaco v. Short*, 444 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). Fisch does not contend that this Court held in *Texaco v. Short* that a mineral rights lapse statute must provide for the filing of a notice of claim as a mechanism to preserve an owner's mineral rights. Fisch agrees with the Respondent that this Court held in *Texaco* that performance of any one of the acts under the Indiana Statute constituted a reasonable condition that imposed only a slight burden on the owner.

The Georgia Statute, however, fails to provide such reasonable conditions that impose a slight burden on the owner in order for the owner to preserve his mineral rights. According to the Georgia Court, if an owner of mineral rights wishes to preserve his or her rights by the payment of taxes as provided for under the Statute, the owner of mineral rights must file a writ of mandamus to compel the tax commissioner to act where no taxes have been assessed and the commissioner's office refuses to accept a return for taxes on mineral interests.

As stated by the Petitioner in his Petition for Writ of Certiorari, "work" or "attempt to work" under the Statute is unconstitutionally vague given the fact that the actions of Fisch to protect his interests were declared by the Georgia Supreme Court to be insufficient to preserve

the mineral interests. Not only did Fisch perform the affirmative acts described above in Section One of this Reply, but on April 15, 1983 and again April 3, 1990, Fisch also filed an affidavit affecting title to real property with the Clerk of the Superior Court of Fulton County, Georgia, which included the subject property, within the seven years prior to the filing of Randall Mill's action. The affidavits clearly stated that Fisch was working or attempting to work his mineral rights which would put all interested parties on notice of his actions.[3] Additionally, Fisch defended an action which challenged his claim to mineral rights on property owned by another Plaintiff in that case.[4] Also, Fisch sold certain of his mineral rights interests and maintains that the selling of mineral rights constitutes working or attempting to work the mineral interests.

As stated above, the Georgia Mineral Lapse Statute also provides that an owner of a mineral interest may pay taxes on the rights in order to preserve them. Fisch repeatedly attempted to pay taxes on the mineral interests and each time returns were refused by the tax commissioner. When faced with these facts, the Georgia Supreme Court in the decision below held that Fisch should have filed a writ of mandamus to compel the tax commissioner to act. Fisch asserts that this is not a reasonable condition which imposes a slight burden on the owner of mineral interests as required by *Texaco v. Short*. Therefore, the decision of the Georgia Supreme Court conflicts with this Court's decision in *Texaco v. Short* and

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[3] *See*, Pet. App. 38a-41a.

[4] *See*, Pet. App. 24a.

review of that decision is appropriate pursuant to Supreme Court Rule 10.1.

III. This case does present a question of federal law which should be settled by this Court.

Again, the Respondent mischaracterizes Petitioners' arguments regarding the unconstitutionality of the Statute. Contrary to the Respondent's assertion, Fisch does not seek to require that all states include filing of a notice of claim as a method for avoiding the effect of a mineral lapse statute. As stated in the petition, Fisch does not challenge the authority of states to enact mineral rights lapse statutes which impose reasonable conditions which constitute minimal burdens.[5] Instead, Fisch challenges the Georgia Statute as being unconstitutionally vague and indefinite rather than the authority of the state to enact such a statute. Thus, the case does present a question of federal law which should be settled by this Court.

IV. Fisch raised the issue of unconstitutional taking of property in the Georgia Supreme Court.

The Respondent claims that Fisch failed to raise in the Court below the issue of whether the conditions imposed by the Georgia Mineral Rights Lapse Statute

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[5] The Respondent claims that other states require some level of mining activity in order for the owner of mineral rights to prevent lapse of the rights. However, mining activity is only one of the methods by which an owner of mineral rights can preserve the rights under similar statutes in other states. *See*, Pet. App. at note 32 and accompanying text.

constitute an unconstitutional taking of property. However, by launching a constitutional attack against the Statute based on lack of due process as a result of the Statute's vagueness and indefiniteness, Fisch raised the issue of unconstitutional taking of property.

The due process clause protects only against deprivation of liberty or property interests. *Wells Fargo Armed Service Corp. v. Georgia Public Service Commission*, 547 F.2d 938 (11th Cir. 1977). There is no dispute that Fisch is attempting to protect his property interest. His loss of that interest is the result of a Statute which violates the due process clause of the Fifth and Fourteenth Amendments which constitutes an unconstitutional taking of his property. Accordingly, the issue was raised in the Court below.

Respondent cites *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992) in support of its position. However, this case is inapposite. *Taylor* involved the question of whether an issue was presented in the Petition for Writ of Certiorari or raised for the first time in Petitioner's brief on the merits. Clearly, that case does not apply to the instant case.

Fisch did preserve the question of whether there was an unconstitutional taking of property, and the issue is properly before this Court pursuant to Supreme Court Rule 14.1(h).

CONCLUSION

For the reasons stated above, in addition to those stated in Fisch's Petition, a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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